No. 96344-4
Consolidated with 96345-2

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner/Cross-Respondent,

v.

KARL PIERCE AND MICHAEL BIENHOFF,
Respondents/Cross-Petitioner

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes.

WAPA is interested in cases, such as this, involving jury selection in criminal trials, including the ability of the parties to discern whether potential jurors are able to fairly and impartially consider a case, and the lasting effect that criminal trials and jury selection process may have on members of the venire.[1]

II. ISSUES PRESENTED

1. Whether *Townsend* was both incorrectly decided and is harmful, such that this Court should abandon it as precedent because it may have the unintended effect of precluding minority participation on Washington's criminal juries?

2. Whether, post-*Gregory*, the "legal underpinnings" of *Townsend* have changed or disappeared altogether such that this Court should abandon it as precedent, and whether continued application of the *Townsend* rule, post-*Gregory*, could undermine public confidence in the judiciary?

[1] WAPA takes no position on the second issue presented by this appeal relating to the exercise of a peremptory challenge by the State.

III. STATEMENT OF THE CASE

The facts of this case are discussed in detail in the briefs of the parties. In short, Michael Bienhoff and Karl Pierce were charged with first degree felony murder predicated on robbery in the first degree after they were involved in a drug transaction that resulted in the death of the purported buyer, Precious Reed.[2]

During voir dire, the prosecutor spoke to the venire about its collective and weighty duty to hear and evaluate the evidence and to render a decision as to the defendants' guilt. RP 824-25. The prosecutor cautioned the venire that "the judge will instruct you that you will have nothing whatsoever to do with punishment or what occurs after [a] finding" and asked whether any member of the venire would have trouble sitting on a jury "where the charge is murder in the first degree." RP 825. To this question, one juror responded, "Is there a death sentence thing in the state of Washington. That might bother me." RP 825. The prosecutor deferred to the trial court for a response to the juror's answer. RP 825. The trial court informed the venire that "the Washington Supreme Court has said that I can't tell you whether a death sentence is involved or not." RP 825-26.

[2] These facts have been taken from *State v. Bienhoff*, 5 Wn. App. 2d 1001 (2018), and *State v. Pierce*, 5 Wn. App. 2d 1001 (2018) (unpublished opinions).

The prosecutor continued questioning the venire whether, knowing that its members would not be informed if the death penalty was involved, any individuals would have difficulty hearing a case involving the charge of first degree murder. RP 826. Some prospective jurors expressed apprehension over hearing a capital case and over sentencing the defendants to capital punishment; one juror asked if the jurors could share any knowledge of "how [the death penalty] works in the State of Washington" and another asked if the jurors could do their own research into the mechanics of the death penalty. RP 827-32.

Based on additional questions from the venire, the trial court instructed that "[i]t's the court's job to do the sentencing. But your job is to decide guilty or not guilty. Whether the State has proven its case beyond a reasonable doubt." RP 836. After the prosecutor engaged in additional discussion with the venire regarding the State's burden of proof, and the duties of the jury, Bienhoff and Pierce ultimately requested a mistrial. RP 836-38. The trial court denied the defense motion, but the Court of Appeals reversed, holding that the prosecutor engaged in misconduct by "eliciting a discussion of the death penalty through his repeated questioning of the jury's understanding and recitation of the charges against Pierce and Bienhoff." Slip op. at 13.

IV. ARGUMENT

SUMMARY

In *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001), this Court found ineffective assistance of counsel where a defense attorney failed to request a mistrial after a jury was informed during voir dire that the case did not involve the death penalty. The State and Pierce both urge this Court to overrule *Townsend*, and Bienhoff agrees that its strict rule should be modified. Supp. Br. of State at 9-10; Supp. Br. of Pierce at 12-13; Supp. Br. of Bienhoff at 11.

Respectfully, WAPA also urges this Court to now abandon *Townsend*. As discussed below, *Townsend* was both wrongly decided and is harmful to litigants (both for the State and the defense), the integrity of the court, and to both prospective and seated jurors. Furthermore, this Court has recently held that the death penalty cannot be constitutionally administered under Chapter 10.95, rendering it unavailable as a sentencing option in Washington. In light of that decision, and the legislature's failure to amend or repeal Chapter 10.95, as well as the other harms discussed below, *Townsend* and its progeny should be abandoned.

ARGUMENT

A. THIS COURT'S PRECEDENT MUST BE DEMONSTRABLY INCORRECT AND HARMFUL BEFORE IT WILL BE ABANDONED.

Courts do not overrule precedent lightly. *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997).

> The question is not whether [the Court] would make the same decision if the issue presented were a matter of first impression. Instead, the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent - "'promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.'"

State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (internal citations omitted).

However, the principle of stare decisis is not an absolute impediment to change. *In re Rights to Waters of Strange Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). In Washington, the principle of stare decisis requires a "clear showing that an established rule is incorrect and harmful before it is abandoned." *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). There are also "'relatively rare' occasions when a court should eschew prior precedent in deference to intervening authority" where "the legal underpinnings of our precedent have changed or disappeared altogether." *Otton*, 185 Wn.2d at 678 (quoting *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207

(2014)). As discussed below, *Townsend* is both incorrect and harmful, and its legal underpinnings have changed such that it should now be abandoned.

B. *TOWNSEND* AND ITS PROGENY ARE INCORRECT AND HARMFUL.

1. A short history of *Townsend* and its progeny.

A five-Justice majority of this Court held in *Townsend* that "it is error to inform the jury during voir dire in a noncapital case that the case is not a death penalty case." 142 Wn.2d at 846. This Court reasoned that a "strict prohibition" against informing a venire of sentencing considerations "ensures impartial juries and prevents unfair influence on a jury's deliberations." *Id*. at 846. In *Townsend*, this Court rejected the State's concerns that a "failure to inform the jury that the death penalty is not involved will unfairly prejudice the prosecution since some jurors may always vote to acquit or opt out if they fear the death penalty may be involved." *Id*. The five-Justice majority expressed that the converse could also be true – "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." *Id*. at 847. In other words, the Court was concerned that when a jury is informed that the death penalty is unavailable, "there is an increased likelihood of a juror convicting" the defendant. *Id*. Instead of

providing prospective jurors "information about the penalty in a noncapital case," jurors should be advised that they are to disregard punishment.

Justice Ireland authored *Townsend*'s four-Justice concurring opinion, expressing that because the death penalty was not involved in Townsend's case, "merely advising the jury of that fact does not place 'undue emphasis' on sentencing considerations." *Townsend,* 142 Wn.2d at 851 (Ireland, J. concurring). Justice Ireland reasoned that "the prospect of applying the death penalty is a staggering responsibility that many prospective jurors would not welcome," and "when ordinary citizens hear that someone is charged with first degree murder, they are likely to think of the death penalty;" her opinion expressed no concern with a trial court merely informing the jury that the death penalty is not involved when those remarks are designed to "ease jurors' anxiety that they might be asked to pronounce a death sentence." Justice Ireland also criticized the majority opinion's concern that informing a jury that the death penalty is not at issue improperly instructs the jury on the available penalties; such an instruction simply informs the jury of what penalty is *unavailable*. *Id*. at 852. Her opinion also expressed concern that when a venire is not informed that the death penalty is unavailable as a sentence, the jury may improperly speculate about the death penalty, which, in turn, may affect the efficacy of the voir dire process. *Id*.

Townsend was followed by *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007). In *Mason*, a juror questioned whether the death penalty was involved after the court queried whether any member of the venire would have difficulty enforcing or applying the law as instructed. In response to the juror's question, the court instructed the venire that its members were not to concern themselves with the punishment that may be administered in the event of a guilty verdict, except insofar as it would make them careful; however, the judge also disclosed that the death penalty was not involved out of his concern that "people who would opt off a jury panel because they oppose the death penalty would be naturally prodefense." *Id*. at 928. This Court adhered to *Townsend*, finding the court's instruction to be in error, albeit harmless. *Id*. at 931. One year later, this Court decided *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008), again finding defense counsel deficient for failing to object when the trial court and prosecution again disclosed to the venire that the death penalty was not at issue in the case; again, this error was found to be harmless. *Id*. at 488-89.

2. Other state courts have found that a trial court does not err by allaying the concerns and anxiety of prospective jurors with respect to the imposition of the death penalty.

A number of other state courts have confronted the same concerns discussed by this Court in *Townsend*, and have found no error in the court

providing an instruction to a venire that the death penalty is not available as a punishment in the particular trial.

For example, in *State v. Dawson*, 783 P.2d 1221 (Ariz. 1989),[3] the trial court informed the jury that counsel had stipulated that the matter was not a capital case; the court provided the jury this information out of its concern that "there are some people…who have strong philosophical and some have even strong moral feelings about the imposition of capital punishment…Some of those people might have some difficulty being involved in a process of factual determination which might…allow a capital punishment to be imposed." *Id*. On review, the appellate court found no error in the trial court's efforts to both "relieve the risk that jurors might be *distracted* in considering issues of guilt by the concern that…the death penalty might result" and to "relieve the risk that panel members…might …seek disqualification 'upon the mistaken belief that they would be called upon to make a life or death decision.'" *Id*. at 1222 (emphasis added); *see also, State v. Mott*, 931 P.2d 1046 (Ariz. 1997) (Arizona Supreme Court rejected notion that such an instruction to the venire could encourage the

[3] *Dawson* was an Arizona Court of Appeals' opinion. WAPA cites this case because it relied upon a number of other states' cases addressing the same issue, and in turn, has been relied upon by other state courts. *Dawson*'s rationale was subsequently adopted by the Arizona Supreme Court in *Mott*, 931 P.2d 1046 (Ariz. 1997).

jury to convict the defendant on "a lesser quantum of evidence than they might otherwise require").

In so holding, the *Dawson* court echoed other state courts that have similarly decided the issue. 783 P.2d at 1222; *see, e.g., Burgess v. State*, 444 N.E.2d 1193 (Ind. 1983) (Supreme Court of Indiana found no error in such an instruction, recognizing that the "possibility of the imposition of a death sentence can be an ever present and secretly held concern of prospective jurors…and might reasonably be expected to improperly influence the manner in which they answer questions on voir dire" and emphasizing that the trial court also instructed the jury that the court, not the jury, was solely responsible for assessing the penalty following any conviction); *People v. Hyde*, 166 Cal. App. 3d 463, 212 Cal. Rptr. 440 (Cal. Ct. App. 1985) (trial court's decision to raise and dispose of death penalty issue at outset of trial saved time and unnecessary strain on potential juror's psyches and avoided the possibility that a prospective juror's concern about the death penalty "might skew his answers to voir dire questioning"; court also rejected as "impossible" the possibility that a jury charged with trying a murder defendant in a noncapital case is more likely to unfairly convict because of a "diminished sense of responsibility");[4] *Stewart v. State*,

[4] In response to Townsend's argument claiming a jury that is aware that the death penalty is not involved, may "become lax" in discharging its duties, Justice Ireland observed that "[i]f such were the case, we would then have to assume that jurors would never give a case

326 S.E.2d 763, 764 (Ga. 1985) (summarily dismissing the defendant's argument that the trial court committed error by mentioning to the venire that the State was not seeking the death penalty; the trial court did not misstate any fact and did not express any opinion).[5] In *State v. Wild*, 880 P.2d 840 (Mont. 1994), the Supreme Court of Montana agreed with *Dawson's* assessment that such an instruction is proper and "by advising the jury up front that the State is not requesting the death penalty as punishment, a broader-based jury may be retained."

Each of these decisions predates *Townsend*, and were likely considered by this Court in deciding *Townsend*. *See, Townsend*, 142 Wn.2d at 851 n.1 (Ireland, J. concurring). As such, a review of these cases, alone, does not necessarily compel the abandonment of *Townsend*. However, WAPA urges this Court to consider the fundamental principles that may be

due consideration unless the death penalty were involved." 142 Wn.2d at 852 (Ireland, J. concurring). WAPA reiterates this argument. For example, there is no evidence to suggest that a jury that hears a DUI trial treats its duties any less seriously than a jury that hears a felony property crime, or than a jury that hears a murder case. Acceptance of this premise as true competes with and undermines this Court's own presumption that the jury will follow the law that is given to it by the trial court; specifically, that it must find the defendant guilty beyond a reasonable doubt. *See e.g., State v. Barry*, 183 Wn.2d 297, 306, 352 P.3d 161 (2015) (presumption that jury follows its instructions).

[5] *And see also*, *Com. v. Smallwood*, 401 N.E.2d 802, 805 (Mass. 1980) (where trial judge was apparently concerned that the death penalty question might interfere with deliberations, especially in light of recent legislative proposals regarding the death penalty, the judge's clarification that the death penalty was unavailable as a sentence was "closely akin" to other permissible instructions, especially where there was no evidence that the jury failed to heed the court's admonition to decide the matter upon the evidence, and without regard to the possible consequences).

drawn from these out-of-state opinions in deciding whether to abandon *Townsend*. Confronting the death penalty question in noncapital cases at the outset of voir dire: (1) may allay prospective jurors' concerns that the death penalty may be imposed; (2) allows jurors to focus their attention solely on their weighty fact-finding function, rather than on their potential anxiety that the death penalty may be imposed; (3) may enhance the probability for truthful responses from prospective jurors; (4) may decrease the likelihood that members of the venire will improperly seek excusal based upon their uncertainty that the death penalty may result from a conviction; and (5) may result in the retention of a "broader-based" venire and resultant jury.

3. *Townsend* is both incorrect and harmful because it may have the unintended effect of precluding minorities from sitting on criminal juries in Washington.

WAPA reiterates Justice Ireland's reasoning in her concurrence criticizing the *Townsend* rule discussed above. There is no evidence that informing a jury the death penalty is unavailable will make the jury inattentive, lazy, or complacent, or will otherwise lower the burden of proof required of the State to support a conviction.[6] The *Townsend* rule is harmful to both prospective and seated jurors because it may have the unintended effect of distracting them from their true duty – to impartially decide the

[6] If true, that reasoning would suggest that misdemeanor and non-homicide felony juries fail to discharge their duties as instructed by the court.

defendant's guilt beyond a reasonable doubt. Jurors should not be unjustifiably concerned that their decision may result in the death penalty – when that penalty cannot, under any circumstance, be imposed in a noncapital case. As above, WAPA recognizes that these arguments are not novel, and all must have been previously rejected by this Court in *Townsend*. It does not appear, however, that this Court has ever considered, in conjunction with the reasons enumerated above, that the *Townsend* rule may have the effect of excluding minorities from being seated as jurors on noncapital murder cases.

The lack of diversity and racial discrimination in criminal juries has troubled the United States Supreme Court and this Court for years. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *City of Seattle v. Erickson*, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017) ("*Batson*…guarantees a jury selection process free from racial animus. Yet, we have noted that our *Batson* protections are not robust enough to effectively combat racial discrimination…We have repeatedly signaled our desire to better effectuate the equal protection guaranties espoused in *Batson*"). In order to reduce the effects of unconscious bias in jury selection, this Court recently adopted General Rule (GR) 37, pertaining to the exercise of peremptory strikes in jury trials. GR 37(a) ("The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or

ethnicity"); *see also, State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) ("[D]iscrimination in this day and age is frequently unconscious and less often consciously purposeful. That does not make it any less pernicious"). However, this new court rule only addresses peremptory challenges; it does not address the exercise of for-cause dismissals of jurors based on their purported inability to fairly decide a criminal case. GR 37.

Importantly, research has shown that minorities are less likely to favor the death penalty. *See e.g.*, Noelle Nasif, Shyam K. Sriram, Eric R.A.N. Smith, RACIAL EXCLUSION AND DEATH PENALTY JURIES: CAN DEATH PENALTY JURIES EVER BE REPRESENTATIVE?, 27-SPR Kan. J.L. & Pub. Pol'y 147, 148 (2018) ("Study after study suggests that death penalty supporters are far more likely to be white, male, and conservative").

In *Dawson*, *Burgess*, *Hyde*, and *Wild*, *supra*, the courts expressed significant concern that a trial court's failure to address the death penalty question head-on could influence both the honesty of the venire's responses to voir dire questioning, and in, turn, the composition of the jury, itself. Therefore, if minorities are less likely to favor the death penalty, they may also be more likely concerned that the case they are called to decide involves the death penalty. As a result, they may be more likely to express concern that they will be unable to decide a case without knowing whether the death penalty is an issue. The inability of a trial court to provide them the answer

to this question may, therefore, have the effect of reducing the number of minority jurors who are eligible to be seated on a jury – either by the juror's self-sought excusal, or based upon an excusal for-cause based upon the juror's representations to the court in voir dire.

The *Townsend* rule, therefore, has a potential to exacerbate a problem with which this Court is already significantly concerned – diversity of Washington's juries. The mere prospect that *Townsend* could have this result is harmful, and demonstrates the flaw in the *Townsend* majority's opinion. The primary concern of the *Townsend* majority was to ensure defendants receive a fair trial. However, the manner in which the Court attempted to accomplish that goal, by prohibiting trial courts from informing venires that the death penalty would not result from their decision, may undercut its objective by inadvertently resulting in decreased minority jury service. For this reason, *Townsend* should be overruled.

4. *Townsend* may work against valid defense strategy aimed at discerning potential jurors' ability to be fair and impartial.

In *Townsend*, the Court rejected the State's concerns that a "failure to inform the jury that the death penalty is not involved will unfairly prejudice the *prosecution* since some jurors may always vote to acquit or opt out if they fear the death penalty may be involved." 142 Wn.2d at 846 (emphasis added). *Townsend* does not address the potential that unfair prejudice may result to a defendant by the application of the same rule.

For instance, defense counsel may wish to have the venire informed that the death penalty cannot result from a conviction in order to gauge potential jurors' ability to be fair to the defendant in deliberations. However, based upon *Townsend's* strict rule, a trial court may decline to so inform the jury, in an effort to prevent a claim of error on appeal. Under such circumstances, does the trial court err, by applying *Townsend*, notwithstanding the defendant's express desire that the jury be informed that the death penalty cannot result from a conviction?

This Court denied review of *State v. Rafay*, which held that, under the circumstances of that case, defense counsel was not ineffective for agreeing that the venire could be informed that the case did not involve the death penalty. 168 Wn. App. 734, 774, 778, 285 P.3d 83 (2012), *review denied* 176 Wn.2d 1023 (2013). This Court's denial of review of *Rafay* suggests that there are, in fact, valid and strategic reasons for informing the jury that the death penalty cannot, under any circumstance, result from a criminal conviction in a noncapital case. The Court of Appeals recognized that:

> defense counsel sought to ascertain whether potential jurors' views on the death penalty affected their ability to be fair in a case involving a very serious crime. The identification of jurors who would allow the potential punishment to affect their determination of guilt or innocence is a legitimate goal of voir dire.

168 Wn. App. at 778.

Thus, it is not only the prosecution that may be prejudiced by the lack of disclosure to the venire that the death penalty cannot result upon conviction as argued by the State in *Townsend*; the defense may also be prejudiced. The strict application of the *Townsend* rule could thwart defense counsel's "deliberate and considered" efforts to facilitate the "complex assessment of potential jurors" and pursue "specific defense theories and objectives during trial." *Id*. at 780-81. For this reason, *Townsend* should be overruled.

5. Post-*Gregory*, defendants are not subject to the death penalty; the trial court should be allowed to honestly apprise the venire of this fact.

In *State v. Gregory*, this Court held that Washington's death penalty is administered in an arbitrary and racially based manner and struck it down as unconstitutional as currently administered under article 1, section 14 of the Washington Constitution. 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018). The legislature currently appears to be taking steps to decodify the death penalty in Washington State. *See* 2019 S.B. 5339.[7] Thus, as of the date *Gregory* was decided, October 11, 2018, no Washington State court can

[7] At the time of the submission of this brief, 2019 S.B. 5339 had passed in the Senate and was being considered by the House. The House also proposed 2019 H.B. 1488, but that bill was not passed by the House by the deadline (March 13, 2019). Both the Senate and the House proposed rules relating to the imposition of the death penalty for prisoners who commit murder while in prison, but neither of those bills appears to have been passed by the house of origin by the deadline. *See*, 2019 H.B. 1709; 2019 S.B. 5364.

constitutionally impose the death penalty; the legislature's actions appear to suggest that it has no intent to revamp Washington's death penalty in an attempt to make its application constitutional.

In *W.G. Clark Const. Co.*, this Court indicated that prior precedent may be abandoned when its legal underpinnings have changed or disappeared. 180 Wn.2d at 66. Thus, under this test, the Court need not find that the prior precedent is both incorrect and harmful before it is abandoned. It is enough that the precedent's "underpinnings [have been] eroded[ ] by subsequent decisions of [the] Court" or "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Id.* (alterations in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)).

Such is the case here. With the extant elimination of the death penalty in Washington, the most severe punishment that may be imposed by any court is life without the possibility of parole. The *Townsend* rule no longer has any place in Washington jurisprudence because even the most heinous murder may only be punished by life without the possibility of parole. There is no reason to believe that, if jurors are informed that there is

no longer a death penalty in Washington State, it will lead jurors to convict a defendant more easily.

Furthermore, perpetuation of the *Townsend* rule, post-*Gregory*, has the potential to undermine public confidence in the integrity of the judiciary. Should a trial court *now*[8] be asked about the applicability of the death penalty in Washington State by an uninformed juror, this Court's mandate that the trial court may not provide a direct answer could create mistrust in other members of the venire – those who *are* aware that the death penalty cannot result from a conviction. The requirement that a trial court must respond obliquely to the *uninformed* juror's question about the potential imposition of the death penalty serves only to foster mistrust in *informed* jurors, who already know the answer, but will fail to understand why the trial court declines to answer this simple question. For that reason, in

[8] WAPA does not mean to suggest that mistrust in the judiciary could not result from the same circumstances occurring pre-*Gregory*. However, it is more likely that, post-*Gregory*, many (but, perhaps, not all) jurors will know that the death penalty can no longer result from conviction in Washington State. *Gregory* has commanded both local and national news coverage. *See, e.g.*, Rachel La Corte and Gene Johnson, *Washington State ends 'racially biased' death penalty*, THE SEATTLE TIMES, October 11, 2018, available at https://www.seattletimes.com/seattle-news/washington-state-supreme-court-tosses-out-death-penalty/; Mark Berman, *Washington Supreme Court strikes down state's death penalty, saying it is 'arbitrary and racially biased'*, THE WASHINGTON POST, October 11, 2018, available at https://www.washingtonpost.com/news/post-nation/wp/2018/10/11/washington-supreme-court-strikes-down-states-death-penalty-saying-it-is-arbitrary-and-racially-biased/?noredirect=on. It is for this reason, that WAPA concentrates its argument on the post-*Gregory* potential that a trial court may be perceived by informed jurors as less-than-candid.

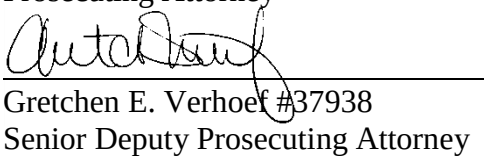
addition to the other reasons discussed above, the *Townsend* rule should be abandoned by this Court.

V. CONCLUSION

This Court's decision in *Townsend* was intended to ensure criminal defendants in Washington have a fair trial. However, as demonstrated above, the *Townsend* rule may operate to exclude minority jurors and may prevent the defense from fully ascertaining the potential jurors' ability to be impartial and open to the defendant's theory of the case. Furthermore, after *Gregory*, the death penalty is not a sentencing option in *any* criminal case in Washington State. The requirement that a trial court adhere to *Townsend*, post-*Gregory*, could undermine public confidence in the integrity of the judiciary. For these reasons, WAPA respectfully requests that this Court abandon *Townsend*, and allow Washington's trial courts to directly inform a venire that the death penalty is no longer available as punishment in any Washington criminal trial.

Dated this 12 day of April, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Petitioner/Cross-Respondent v. MICHAEL BIENHOFF, Respondent/Cross-Petitioner	Consolidated w/No. 96344-4 **CERTIFICATE OF SERVICE**

I certify that on the 12 day of April, 2019, I caused a true and correct copy of this Brief of Amicus Curiae of Washington Association of Prosecuting Attorneys to be served on the following in the manner indicated below:

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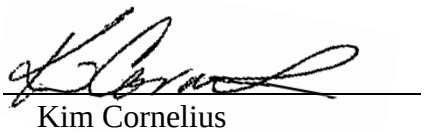
By: 
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